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In the Supreme Court of the United States

OCTOBER TERM, 1995

TYRONE BROOKS, ET AL., APPELLANTS

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO VACATE AND DISMISS

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QUESTIONS PRESENTED

Minority voters sought to intervene in this case for purposes of appealing the district court's merits judgment under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The United States' notice of appeal was pending at the time the district court considered the intervention motion. The appeal in this case presents the following two questions:

1. Whether the district court correctly dismissed the intervention motion for lack of jurisdiction.

2. Whether appellants, who are not parties in this action, may currently appeal the three-judge court's merits judgment.

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No. 95-177

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v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO VACATE AND DISMISS

Pursuant to 28 U.S.C. 2106 and Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court denying intervention for lack of jurisdiction be vacated, that the case be remanded for consideration of the intervention motion, and that the appeal be otherwise dismissed.

OPINIONS BELOW

The opinion of the three-judge district court granting a declaratory judgment for the State of Georgia (J.S. App. 3-19) is reported at 881 F. Supp. 7. The district court's order denying appellants' motion to intervene (J.S. App. 20-21) is unreported.

JURISDICTION

The judgment of the three-judge district court granting a declaratory judgment was entered on February 3, 1995. On March 6, 1995, appellants filed a motion to intervene as defendants, together with a notice of appeal. See J.S. 4. The judgment of the district court dismissing appellants' motion to intervene was entered on April 4, 1995. Appellants' notice of appeal (J.S. App. 22-23) was filed on June 1, 1995, and the appeal was docketed on July 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b),[1] and 42 U.S.C. 1973c.

STATEMENT

The State of Georgia is a jurisdiction covered under Section 4 of the Voting Rights Act of 1965, 42 U.S.C. 1973b. Under Section 5 of the Act, 42 U.S.C. 1973c, a covered jurisdiction may not implement a change in any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,"[2] unless (1) it has obtained a declaratory judgment from the United States District Court for the

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[1] Although former Rule 18.1 of the Rules of this Court (1994) on its face restricted the time in which to file an appeal to 30 days, 28 U.S.C. 2101(b) authorizes the filing of an appeal within 60 days of final judgment. "There seems little doubt * * * that the conflict between the rule and § 2101 should be resolved in favor of the statute." R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 387 (7th ed. 1993); see 28 U.S.C. 2071(a). Compare current Supreme Court Rule 18.1 (effective Oct. 2, 1995) (eliminating 30-day limit).

[2] Electoral changes are measured under Section 5 by comparison with voting practices in place on certain statutorily established dates. With regard to the State of Georgia, the pertinent date is November 1, 1964. See 28 C.F.R. Pt. 51, App.

District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or [on account of membership in a language minority group]," or (2) it has submitted the proposed change to the Department of Justice for administrative preclearance[3] and the Department has interposed no objection to it.

1. As of November 1, 1964, 61 Superior Court judgeships existed in Georgia. J.S. App. 6. Between 1964 and 1994, Georgia created 98 additional judgeships by statute,[4] but did not submit any of those judgeships for Section 5 review until 1988. See *Brooks* v. *State Bd. of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989) (three-judge court) (ordering Georgia to submit for preclearance judgeships created since November 1, 1964), aff'd mem., 498 U.S. 916 (1990). The State submitted the post-1964 judgeships to the Department of Justice during the six-year period between 1988 and 1994. The Assistant Attorney

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[3] The Attorney General has delegated to the Assistant Attorney General for Civil Rights the authority to issue Section 5 preclearance determinations. See Department of Justice Regulations, 28 C.F.R. 51.3.

[4] Although the district court stated (J.S. App. 6) that Georgia created 77 new judgeships during the relevant time period, and the State in its Motion to Affirm (at 4) asserts that it created 88 new judgeships, the record reflects that 98 is the correct number. As the State described in its pretrial brief before the district court, 77 additional judgeships were created between 1964 and 1988, and another 21 were created between 1988 and the time of the trial in this case. State's Pretrial Br. 17; see also Motion to Affirm 4 (Georgia has increased the number of judgeships by 98, from 61 to 159).

General for Civil Rights refused to preclear 62 of the 98 additional judgeships. J.S. App. 6.

2. On August 24, 1990, Georgia filed suit in the United States District Court for the District of Columbia under Section 5, seeking judicial preclearance of the judgeships for which administrative preclearance had been denied. See 42 U.S.C. 1973c. On October 19, 1990, appellants—African-American voters within the State—sought leave to intervene as defendants in that litigation. At that time, the United States argued that appellants had no right to intervene pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, but urged the district court to grant appellants permissive intervention under Rule 24(b).[5] Gov't Dist. Ct. Br. in Response to Motion to Intervene 1-3. The State of Georgia opposed both intervention as of right and permissive intervention, arguing, *inter alia*, that the United States would adequately represent the interests of appellants. State's Dist. Ct. Br. in Opposition to Motion to Intervene 2.

On December 21, 1990, the district court denied the motion to intervene "for the reasons set forth in the Government's response and the State of Georgia's

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[5] Three-judge courts empaneled under Section 5 have routinely granted permissive intervention to minority voters affected by the electoral change at issue in the litigation. See, *e.g.*, *Bossier Parish Sch. Bd.* v. *Reno*, 157 F.R.D. 133, 135 (D.D.C. 1994); *Texas* v. *United States*, 802 F. Supp. 481, 482 n.1 (D.D.C. 1992); *County Council of Sumter County* v. *United States*, 555 F. Supp. 694, 696-698 (D.D.C. 1983); *City of Port Arthur* v. *United States*, 517 F. Supp. 987, 991 n.2 (D.D.C. 1981), aff'd, 459 U.S. 159 (1982); see also *Commissioners Court of Medina County* v. *United States*, 683 F.2d 435, 438-439 (D.C. Cir. 1982) (attorneys' fees). But see *Apache County* v. *United States*, 256 F. Supp. 903, 906-908 (D.D.C. 1966).

opposition," but permitted appellants to participate in the litigation as *amici curiae*. *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.). The district court denied appellants' motion for reconsideration on June 7, 1991, *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.), and denied appellants' renewed motion to intervene on September 23, 1991. A footnote in the latter order noted that Judge Johnson "was disposed to grant the motion to intervene, and continues to hold that position." *Georgia* v. *Thornburgh*, Civil Action No. 90-2065 SSH (D.D.C.), Order at 1 n.1.

A four-day bench trial was held in October, 1994. On February 3, 1995, the district court ruled for the State, and entered a judgment declaring that the creation of the additional judgeships did not have the purpose and would not have the effect of abridging the right to vote on account of race or color. J.S. App. 3-19. Judge Johnson dissented and reserved the right to file a separate opinion, but has not yet done so. *Id.* at 2 n.*.

On March 6, 1995, the thirtieth day after entry of the merits judgment, appellants filed a motion to intervene as defendants for purposes of appeal, together with a notice of appeal. J.S. 4; J.S. App. 20. On the same day, the United States filed a notice of appeal. J.S. App. 20. The State opposed appellants' motion for intervention. The United States took no position on the motion. *Ibid.* On April 4, 1995, the district court dismissed the motion, holding that the filing of a notice of appeal by the United States had divested the court of jurisdiction to act on matters involved in the appeal. *Id.* at 20-21.

On June 5, 1995, the United States moved, pursuant to Rule 18.5 of the Rules of this Court, voluntarily to

dismiss its appeal from the merits decision of the three-judge court. J.S. 4.

ARGUMENT

1. During the post-judgment period in which a party may take an appeal, persons who are not parties to a civil action may seek to intervene in that action for the purpose of appealing the district court's final judgment. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977); *Bryant* v. *Yellen*, 447 U.S. 352, 365-367 (1980). In this case, the district court dismissed appellants' post-judgment motion for intervention on the ground that the United States' notice of appeal deprived it of jurisdiction over the motion. J.S. App. 20-21. The United States, however, subsequently withdrew its appeal. J.S. 4. Any defect in the district court's jurisdiction has therefore been cured,[6] and there currently is no barrier to the district court's determining whether appellants may intervene for purposes of appeal. Accordingly, this Court should vacate the dismissal of appellants'

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[6] This Court has stated that "[t]he filing of a notice of appeal * * * divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (per curiam). The courts of appeals are divided as to whether a motion for intervention is such an "aspect[] of the case." Compare *Roe* v. *Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990) and *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 928 (5th Cir. 1983) with *Halderman* v. *Pennhurst State Sch. & Hosp.*, 612 F.2d 131, 134 (3d Cir. 1979) (en banc); cf. *United Airlines*, 432 U.S. at 395 n.16 (citing with approval district court decision to grant intervention motion after notice of appeal was filed). Because any potential jurisdictional impediment has now been removed, the Court need not reach that question in this case.

motion and remand that issue to the district court for reconsideration in light of the United States' decision not to pursue an appeal of the underlying judgment. See, *e.g.*, *Speight* v. *Slaton*, 415 U.S. 333, 335 (1974) (per curiam) (vacating judgment of three-judge court and remanding for reconsideration in light of changed circumstances).

The case-specific nature of intervention determinations under Rule 24 of the Federal Rules of Civil Procedure counsels remand in this case. Rule 24(a)(2)[7] provides that persons may intervene as of right when "[1] [u]pon timely application * * * [2] the applicant claims an interest relating to the property or transaction which is the subject of the action and [3] the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest [and 4] the applicant's interest is [not] adequately represented by existing parties." The decision whether the movant has satisfied these requirements in a particular case requires a fact-intensive inquiry best left to the district court in the first instance. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 428 (1993) (per curiam) (denial of intervention is a "relatively factbound issue"); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 135 (1967) ("[T]he circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court."); see also *NAACP* v. *New York*, 413 U.S. 345, 364 (1973) (noting that a "detailed recital

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[7] Appellants do not claim that they are eligible for intervention as of right under Rule 24(a)(1).

of the facts and of the history of the case is necessary because of the discretionary nature of the District Court's order [denying a motion to intervene in Section 4 litigation]").

Rule 24(b)(2) grants the district court discretion to permit intervention where the court finds that the "applicant's claim or defense and the main action have a question of law or fact in common," and that intervention will not "unduly delay or prejudice the adjudication of the rights of the original parties." The district court is in a unique position to determine how the addition of new parties will affect the future course of the litigation. District court decisions granting or denying permissive intervention are therefore reviewed only for a "clear abuse" of discretion, *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U.S. 137, 142-143 (1944), and generally will be overturned only where a district court has failed to exercise its discretion due to an error of law, see *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 559-560 (1974) (where district court erroneously concluded that prospective intervenors were barred by statute of limitations, court of appeals' decision remanding intervention question for further proceedings "merely directed that discretion be exercised").

Because the district court in this case believed itself to be without jurisdiction, it neither made factual findings nor exercised its discretion as to appellants' intervention motion. Moreover, the United States' subsequent decision to withdraw its appeal is relevant to whether appellants' interests are still "adequately represented" by the United States for purposes of Rule 24(a)(2), and is a factor that the district court may consider in exercising its dis-

cretion under Rule 24(b). See, *e.g.*, *Meek* v. *Metropolitan Dade County*, 985 F.2d 1471, 1478 & n.2 (11th Cir. 1993); *Yniguez* v. *Arizona*, 939 F.2d 727, 737-738 (9th Cir. 1991); *Baker* v. *Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986); *Triax Co.* v. *TRW, Inc.*, 724 F.2d 1224, 1228 (6th Cir. 1984); *United States* v. *AT&T*, 642 F.2d 1285, 1293-1294 (D.C. Cir. 1980). In light of these considerations, we believe the Court should vacate the district court's judgment dismissing appellants' motion to intervene and remand for reconsideration in light of the subsequent change in circumstances. See generally *Speight* v. *Slaton*, *supra*.

2. Because appellants have never been made parties to this case, they may not currently appeal the merits of the underlying judgment. It is well established that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino* v. *Ortiz*, 484 U.S. 301, 304 (1988) (per curiam); accord *Karcher* v. *May*, 484 U.S. 72, 77 (1987). Appellants' appeal from the district court's judgment on the merits should therefore be dismissed.[8]

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[8] The question of intervention is jurisdictionally independent of the underlying merits for purposes of appeal. See *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 688 (1961) (failure to appeal merits did not make appeal of denial of intervention moot). Should the district court on remand grant appellants intervenor status, that court will likely have to consider the question whether that status should relate back to appellants' March 6, 1995, notice of appeal. Cf. *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 406-407 n.11 (1980) ("We merely hold that when a District Court erroneously denies a procedural motion, which, if correctly decided, would have prevented the action from becoming moot, an appeal lies from the denial and the corrected ruling 'relates back' to the

CONCLUSION

The judgment of the district court denying appellants' motion for intervention should be vacated, and the case should be remanded for further proceedings in light of the United States' withdrawal of its appeal. Appellants' appeal from the district court's merits decision should be dismissed.

Respectfully submitted.

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date of the original denial."); *Linton by Arnold* v. *Commissioner of Health & Environment*, 30 F.3d 55, 56 (6th Cir. 1994). But cf. *FEC* v. *NRA Political Victory Fund*, 115 S. Ct. 537, 543-544 (1994) (rejecting relation back doctrine in jurisdictional context). Alternatively, the district court may elect to take other steps to permit a timely notice of appeal to be filed. Cf. 16 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3950, at 599 (Supp. 1995) (district court has power in "exceptional circumstances" under Fed. R. Civ. P. 60(b) to vacate judgment for the purpose of establishing opportunity to file a timely notice of appeal). In any event, the district court is in the best position to determine, in the first instance, the appropriate procedural course.